



AFBF Freedom of Information Request

Rotondi, Joanne to: FOIA HQ

Cc: "Banks, James T."

09/10/2013 03:44 PM

Dear EPA Headquarters FOI Officer,

On behalf of AFBF, and my partner Jim Banks, please find attached a FOI request. A hard copy was mailed today via USPS.

Thank you.

Joanne Rotondi
Counsel

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system. FOIA Request to EPA 9.10.2013.pdf

September 10, 2013

By First Class Mail & Electronic Mail

Records, FOIA and Privacy Branch
Office of Environmental Information
Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Freedom of Information Act Request

Dear FOI Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") and FOIA regulations at 40 C.F.R. § 2, and on behalf of the American Farm Bureau Federation ("AFBF"), I write to request information from EPA Headquarters relating to the regulatory status under the Clean Water Act ("CWA") of precipitation runoff or precipitation "discharge" associated with concentrated animal feeding operations ("CAFOs") and animal feeding operations ("AFOs"). This request concerns only records in the possession of EPA Headquarters, as we intend to make separate requests to EPA Regional offices of interest.

This request constitutes a new submission. This request also constitutes a withdrawal of Request Number EPA-HQ-2013-008492, submitted on July 17, 2013, which was a withdrawal of Request Number EPA-HQ-2013-008140 submitted on July 12, 2013, which itself constituted a withdrawal of our request submitted May 3, 2013 (EPA-HQ-2013-006155) and submission of a substantively identical records request along with a fee waiver request. In correspondence dated July 15, 2013, EPA perfunctorily denied our fee waiver request (in EPA-HQ-2013-008140) on the basis that we had "not expressed a specific intent to disseminate the information to the general public". In correspondence dated July 26, 2013, EPA perfunctorily denied our fee waiver request (in EPA-HQ-2013-008492) on the basis that we had "failed to demonstrate that the release of the information requested significantly increases the public understanding of government operations or activities". Although we disagree with the Agency's denial

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determinations, we hereby withdraw our previous requests and submit this new request to address the Agency's bases for denial and to make crystal clear that AFBF is a public interest, not-for-profit, non-commercial requester that intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF. Moreover, this request further clarifies how disclosure of the requested records will contribute significantly to the public's understanding of EPA's operations and activities, namely, its implementation of the CWA.

Background of This Records Request

In a May 30, 2013 telephone discussion seeking to clarify the substance of AFBF's initial May 3, 2013 records request, representatives from EPA Office of General Counsel and Office of Water indicated that the Agency has previously granted FOIA fee waivers to not-for-profit organizations also seeking a broad scope of information. When asked if AFBF, a not-for-profit organization, could similarly request a fee waiver, the Office of General Counsel representative ultimately answered that a fee waiver request would need to be submitted at the same time as the FOIA request. Consequently, we hereby submit our FOIA request with the fee waiver request included. Our expectation is that, pursuant to FOIA, the Agency has 20 working days from this submission to respond to this request and can of course provide partial responses as soon as they become available. As stated by the Attorney General in the 2009 FOIA Memorandum, "timely disclosure of information is an essential component of transparency".

We appreciate the Agency's willingness "to work in the spirit of cooperation" as President Obama has directed and to work with us to discuss the substance of our records request. As previously discussed, we look forward to the Agency getting back to us to further describe the types of records that Office of Water staff believes are responsive to our request and that would not be subject to an exemption from disclosure under FOIA. We also look forward to receiving documents responsive to this request from the Office of Enforcement Compliance Assistance (OECA) as they become available.

FOIA is intended to ensure public access to government information and establishes a presumption that all agency records will be publicly accessible unless specifically exempted from disclosure. According to the Attorney General's 2009 FOIA Memorandum, "unnecessary bureaucratic hurdles have no place in the new era of open Government that the President has proclaimed". AFBF is committed to ensuring that its members, state Farm Bureau organizations, farmers and ranchers throughout the country, and the general public are informed about how government regulations and policies, including those by EPA that are the subject of this request, affect farming practices and rural communities. We appreciate EPA's assistance in providing access to the Agency's public records pursuant to this FOIA request.

Records Requested

Our records request is as follows: AFBF hereby requests all records relating to the CWA regulatory status of precipitation runoff (whether diffuse or channeled, and whether deemed by EPA to be "stormwater" or "process wastewater" or "discharge") associated with fan exhaust deposits or material tracked, spilled or otherwise deposited onto the ground outside of the confinement housing or waste storage or containment structures at CAFOs or AFOs, including whether such runoff should be deemed a "discharge" requiring a National Pollutant Discharge Elimination System ("NPDES") permit. Without limiting the breadth of this request, as stated, we call EPA's attention to the following specific categories of records that are included in this request:

- (1) Any and all internal communications within EPA, including communications within EPA Headquarters or between EPA Headquarters and EPA Regions, relating to the CWA regulatory status of the above-described runoff.
- (2) Any and all communications between EPA and any state agencies or departments, or staff thereof, or other third parties, relating to the CWA regulatory status of the above-described runoff.
- (3) Any and all administrative orders and notices of violation issued to, and other correspondence with, CAFO or AFO owners or operators, relating to the CWA regulatory status of the above-described runoff, as well as any inspection reports and findings related to such orders and notices.
- (4) Any and all communications between EPA and any state agencies or departments, or staff thereof, or other third parties, relating to any of the records described in (3) above.
- (5) Any and all internal communications within EPA, including communications within EPA Headquarters or between EPA Headquarters and EPA Regions, relating to any of the records described in (3) above.

Defined Terms

The term "EPA" as used herein refers to the United States Environmental Protection Agency and includes all headquarters and regional offices, and all officers, staff, agents, consultants, political appointees and employees thereof.

The term "records" as used herein includes the original and all non-identical copies or drafts, however produced or reproduced, of any written or graphic matter, as well as computer files, including but not limited to writings, handwritings, drawings, graphs, charts, maps, correspondence, faxes, electronic mail (i.e., e-mails), attachments to electronic mail, any other electronic communications, notes of telephone conversations

or of meetings or conferences, minutes of meetings, interoffice communications, memoranda, reports, studies, analyses, results of investigations, photographs, sound recordings, trip files, electronically stored information, other data compilations from which information can be obtained, and any other documentary material, regardless of physical form or characteristics.

The term "relating to" as used herein means addressing, constituting, mentioning, discussing, describing, reflecting, identifying, dealing with, consisting of, explaining, referring to, containing, enumerating, or in any way concerning or pertaining to, in whole or in part, directly or indirectly.

FOIA Response

The records requested herein relate to the regulatory status under the CWA of precipitation runoff or precipitation "discharge" associated with CAFOs and AFOs.

We believe that these records are not exempt from disclosure. If EPA should deny access to any records covered by this request, however, please describe in detail each of those records and specify the statutory basis claimed for denial as well as any reasons for asserting that claim. As you know, FOIA provides that if only a portion of a record is exempt from release, all reasonably segregable portions shall be provided. Thus, if EPA asserts that a portion of a record that we have requested is exempt, please provide us with a copy of the remainder of the record. If EPA asserts that the exempt portions cannot be reasonably redacted, please state in detail the reasons for that assertion.

Please provide the requested material at the earliest possible date, and, in any event, please provide as complete a response as possible to this request within the twenty (20) day period prescribed by FOIA. As described above, AFBF's initial (and substantively identical) request was submitted on May 3, 2013 and over 65 business days have passed. Please forward currently available records as soon as possible and others as they become available.

Fee Waiver Request

AFBF hereby asks EPA to waive all fees associated with this request. As required for a FOIA fee waiver, under 5 U.S.C. § 552(a)(4)(A)(iii), disclosure of the information requested is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of EPA, as an agency of the federal government, and (2) not primarily in the commercial interest of AFBF or its members. As described below, AFBF and this request for records meet FOIA's requirements for a fee waiver, as well as the six factors that EPA uses to review fee waiver requests under FOIA, at 40 C.F.R. § 2.107(l).

Congress has directed, and the federal courts have recognized, that FOIA's fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters". *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) ((quoting , 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)). See also *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C.Cir. 2003) (same); *NRDC v. EPA*, 581 F. Supp. 2d 491, 497 (S.D.N.Y. 2008) (same). AFBF is a non-commercial requestor and is therefore entitled to a liberal construction of the fee waiver standards.

AFBF is organized and recognized by the IRS as a § 501(c)(5) not-for-profit "agricultural organization" whose primary purpose is to be the unified national voice of agriculture, working along with our 50 member Farm Bureau organizations in all states plus Puerto Rico to strengthen and improve American agriculture and to build strong, prosperous rural communities.¹ AFBF is an independent and voluntary organization governed by and representing American farmers and ranchers united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and technological improvement and, thereby, to promote an efficient, productive, and strong agricultural community. AFBF's members include farmers and ranchers who raise animals and are or may be regulated by the CWA.

AFBF utilizes policy advocacy and public communications to achieve its mission. AFBF's public policy advocacy efforts include serving as a watchdog over the regulatory and enforcement activities of federal agencies such as EPA, as a voice for the farm and ranch community before Congress, and as a strong advocate on behalf of farmers and ranchers before federal courts. AFBF has an extensive and professional communications staff that ensures that AFBF's advocacy, analysis, information and news reporting on issues important to agriculture are routinely disseminated to AFBF's membership, Congress and the general public.

These public policy advocacy and communications efforts are very similar to the activities of other advocacy organizations that routinely receive fee waiver quests from EPA—the only difference would be the membership and policy goals of the organizations. The specific policy goals of AFBF, however, are irrelevant to this fee waiver request under FOIA, since EPA must comply with FOIA's fee waiver standards regardless of the legal or policy position taken by any requestor concerning the content of the information sought.

How EPA implements the CWA and its regulations is of key importance to AFBF, its members and the public. AFBF has devoted considerable resources to litigation against (and on behalf of) EPA related to CWA implementation and regularly lobbies both EPA and Congress on issues of water quality. AFBF analyzes and provides information about EPA's CWA implementation to the farm and ranch community, Congress and members of the general public with an interest in issues affecting agriculture. Both the farm and ranch community and the general public have a strong interest in

¹ For more information about AFBF, please see the organization's website at www.fb.org.

understanding how EPA interprets its obligations under the CWA and uses its enforcement powers to regulate agriculture. For several years, EPA has repeatedly indicated that the regulation of CAFOs under the CWA is an enforcement priority for the Agency. Clearly, EPA believes it is important that the public understand how the Agency is enforcing the CAFO rule. This records request simply seeks additional information on a topic EPA already has established as an issue of national importance.

AFBF intends to disclose and use the information requested herein to help its members, lawmakers, and the general public better understand government. Disclosure of the information requested herein satisfies FOIA's fee waiver provision and is "in the public interest because it is likely to contribute significantly to public understanding of" how the Office of Water and OECA interpret and apply EPA's CWA authority to agriculture. Additional information addressing each of EPA's six factors at 40 C.F.R. § 2.107(l) is provided below.

Factor 1. The subject of the request. The subject of our request concerns the direct and identifiable "operations and activities" of the EPA, including actions by the Office of Water and OECA, and by EPA staff in the performance of their duties. See 40 C.F.R. § 2.107(l)(2)(i). Congress directed EPA to take an active leadership role in implementing certain sections of the CWA and overseeing CWA enforcement and policy by state regulatory authorities. How EPA determines its own policies and communicates those policies and mandates to the states, the regulated community and the public is a direct and identifiable operation and activity of EPA. Specifically, this request concerns a high-profile and controversial legal interpretation currently taken by some within EPA. AFBF has filed this request seeking to disclose how EPA interprets and enforces a key section of the CWA and EPA's implementing regulations with regard to precipitation runoff or precipitation "discharge" associated with certain CAFOs and AFOs.

Factor 2. The informative value of the information to be disclosed. FOIA dictates that a fee waiver should be granted when a disclosure is "*likely* to contribute significantly to public understanding of the operations or activities of the government". 40 C.F.R. § 2.107(l)(2)(ii)(emphasis added). It is widely known that the scope of the agricultural stormwater exemption is of great interest to farmers who raise animals, to activist organizations who seek to impose limits on agricultural practices and to the general public. Regardless of an individual or organization's view of the law, the manner in which EPA interprets the CWA and its own regulations and implements its regulatory authority is of significant interest to the public and has been the subject of substantial media coverage. Since EPA sets national policy, approves state regulatory programs and enforcement priorities, and initiates enforcement actions against farmers and ranchers, disclosure of this information meets the FOIA fee waiver standard as the disclosure will *likely* contribute to the public's understanding of the EPA's implementation of the CWA. Importantly, this information will enable farmers and ranchers to better understand EPA's regulatory policy and thus influence management decisions on the farm.

The information requested is substantive, not administrative in nature, and is not readily available from any other source but EPA. In addition, the information requested is not already available in the public domain (including in existing dockets for previous CAFO rulemakings). Currently, the information already available in the public domain does not sufficiently respond to questions and uncertainties about how EPA regulates the subject of this request—the precipitation runoff or precipitation “discharge” associated with certain CAFOs and AFOs. For example, in previous documents not directly on point but addressing the issue in passing, EPA has referenced such runoff in various ways, including as “industrial wastewater” or “process wastewater” or as “stormwater”.

It is immaterial whether EPA believes that the records it may find shed significant light on its position regarding agricultural stormwater. See 40 C.F.R. § 2.107(l)(2)(iv) (FOIA officers shall “not make value judgments” about the importance of the information requested). FOIA requires EPA to grant a fee waiver when, as in this case, the disclosure is *likely* to contribute to the *public* understanding of EPA operations.

Factor 3. The contribution to an understanding of the subject by the public is likely to result from disclosure. As described above in Factor 2, the requested information will “contribute to public understanding” by a broad audience of persons interested in how EPA implements its authority under the CWA, including AFBF’s members, farmers and ranchers in general, lawmakers and the public. 40 C.F.R. § 2.107(l)(2)(iii). As part of its mission as a national not-for-profit organization interested in how EPA’s operations and activities affect farmers and ranchers, AFBF has a particular interest in how EPA implements its regulatory authority under the CWA with regard to certain precipitation runoff associated with farming operations.

Moreover, AFBF “has the ability and intention to convey this information to the public,” 40 C.F.R. § 2.107(l)(2)(iii), and will use its extensive news media coverage to broadly inform the public of information found in EPA’s response. AFBF can accomplish this public dissemination of information by any of the following:

- Publication of a bi-monthly electronic newsletter “FBNews” with a circulation of 15,000 people.
- Daily electronic distribution of “Executive Newswatch” which reports on news issues of interest to agriculture. The electronic distribution is to all 50 member Farm Bureaus, which in turn further distribute the information in their discretion.
- Bi-weekly reporting through a radio “Newsline” on current issues of interest to agriculture. This recorded Newsline is distributed nationwide through the national association of farm broadcasting, reaching up to 180,000 member stations nationwide.

- Weekly issue columns called "Focus on Ag" distributed to over 500 media outlets nationwide.
- Web based portals and social media, including AFBF's website at www.fb.org (672,559 visits from January 1, 2013 to June 30, 2013) Facebook (over 15,000 followers) and twitter.

AFBF also intends to disseminate and make available to the public any responsive documents that EPA provides to AFBF by posting them on its public website, at www.fb.org, within two months of receipt.

Factor 4. The significance of the contribution to public understanding.

Disclosure of the requested information is likely to contribute "significantly" to public understanding of EPA's operations or activities because, as explained above, the information requested has not previously been released or is not readily available, and the information already available on the subject of this request does not clearly establish how EPA implements its CWA authority. 40 C.F.R. § 2.107(l)(2)(iv). As the U.S. Court of Appeals for the Tenth Circuit has held, with regard to whether release of the requested records will have a "significant" contribution, fee waiver requesters "should get the benefit of the doubt". *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005).²

Disclosure of the information requested will inform AFBF and its members, farmers and ranchers, lawmakers and the public about the regulatory status of certain precipitation runoff associated with farming operations and how EPA treats such runoff with regard to administrative enforcement. Currently, public awareness and understanding of this subject is low in part because EPA's position is unclear and the Agency has provided conflicting, ambiguous and incomplete public statements. Therefore, disclosure of the requested information will contribute significantly to AFBF's, farmers and ranchers' and the public's understanding of EPA's authority under the CWA.

Factor 5. The existence and magnitude of a commercial interest. AFBF is a not-for-profit organization and has no commercial, trade or profit interest that would be furthered by the requested information. AFBF's interest is to provide the requested information to its members and the interested public as a news organization would provide information to its subscribers and the public. EPA ordinarily presumes the

² Moreover, in evaluating the significance of the disclosure's contribution to the public understanding, EPA shall "not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is 'important' enough to be made public." 40 C.F.R. § 2.107(l)(2)(iv). See also 132 Cong. Rec. S14,298 (Sept. 30, 1986) (statement of Sen. Leahy) (emphasizing that agencies should administer fee waiver provision in "an objective manner and should not rely on their own, subjective view as to the value of the information").

public interest will be the interest primarily served by disclosure to a news media requester. As described herein, AFBF's interest in requesting this information is to disclose it to its members, farmers and ranchers, lawmakers and the public how EPA implements its authority under the CWA.

Factor 6. *The primary interest is in disclosure.* AFBF does not have a commercial interest in disclosure, and even if it did, it would only be secondary and indirect and would be outweighed by the primary public interest in disclosure of the information requested. Indeed AFBF's interest is no different from that of a private citizen seeking the same information about government. AFBF regularly engages in informational, legislative and litigation campaigns designed to influence public policy consistent with AFBF's mission—to enhance and strengthen the lives of rural Americans and America's agricultural communities. Such public policy campaigns do not amount to furthering a direct interest in commerce, trade or profit regardless of whether the focus of the policy campaign is to the benefit of entities regulated by EPA—e.g., by informing farmers and ranchers about their responsibilities to comply with the CWA and other laws administered by EPA. Moreover, although AFBF is currently engaged in litigation with EPA, this FOIA request does not amount to “an attempt at discovery” as that litigation is (1) based on an administrative record that has already been completed; and (2) involves summary judgment briefing that is due to be completed prior to the anticipated response date for this FOIA request.

A fee waiver is justified because disclosure of the requested information is in the public interest and that public interest is greater in magnitude than any potential commercial interest AFBF could have in disclosure. After EPA's initial review of AFBF's now withdrawn May 3, 2013 FOIA request seeking this same information, EPA informed AFBF that the cost of complying with this FOIA request would be extraordinarily high. After unsuccessful attempts to seek common ground to narrow the scope of the request, EPA cannot continue to deny AFBF's fee waiver request, each time citing to different grounds for denial, when the request seeks information that falls squarely within FOIA's requirements for granting a fee waiver. To do so is imposing a barrier to access to information expressly disallowed by Congress—and contrary to the spirit and directives issued by this Administration.³

AFBF is a Media Reporter

If AFBF's above fee waiver request is denied, AFBF seeks a fee waiver under the media exemption. AFBF serves the function of a media reporter and thus qualifies as a “representative of the news media or news media requestor”. 40 C.F.R. § 2.107(b)(6). AFBF's communications department regularly collects, analyzes and disseminates

³ See U.S. Department of Justice, *FOIA Fee Summit* at 36 (“Estimated fees should not be used to discourage requesters from exercising their access rights under the FOIA.”), available at <http://www.justice.gov/oip/docs/fee-summit.pdf>.

news of current events and current interest to its members and the general public through:

- Publication of a bi-monthly electronic newsletter "FBNews" with a circulation of 15,000 people.
- Daily electronic distribution of "Executive Newswatch" which reports on news issues of interest to agriculture. The electronic distribution is to all 50 member Farm Bureaus, which in turn further distribute the information in their discretion.
- Bi-weekly reporting through a radio "Newsline" on current issues of interest to agriculture. This recorded Newsline is distributed nationwide through the national association of farm broadcasting, reaching up to 180,000 member stations nationwide.
- Weekly issue columns called "Focus on Ag" distributed to over 500 media outlets nationwide.
- Web based portals and social media, including AFBF's website at www.fb.org (672,559 visits from January 1, 2013 to June 30, 2013), Facebook (over 15,000 followers) and twitter.

Accordingly, AFBF also is entitled to a waiver of fees as a news media reporter.

Alternatively, in accordance with FOIA and applicable regulations, AFBF is prepared to pay the proper fees for the direct costs of record searches, review and duplication if this fee waiver request is properly denied. If your office estimates that costs will exceed \$1000, please call me before complying with this request to obtain my agreement to pay the fees.

Please contact me at (202) 637-5802 or via e-mail at james.banks@hoganlovells.com if you have any questions concerning this request. I look forward to your prompt response.

Sincerely,



James T. Banks
Partner
Counsel for AFBF

cc: Ellen Steen
Steve Butler